Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CITY OF OCEANSIDE, JOHN MAMAUX,
Petitioners,

v.

WILLIAM SHAFER,
Respondent.

Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a government employer denies a job applicant a government benefit under 42 U.S.C. § 1983 by declining to hire the applicant allegedly because of his prior exercise of First Amendment free speech rights.
2. Whether governmental entities as employers may be subject to civil rights lawsuits for failing to hire job applicants based on allegations that the applicant was denied employment because of his free speech exercises.
3. Whether a First Amendment civil rights claim may be asserted by a job applicant having no property interest in a particular government job or position.

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

1. William Shafer: Plaintiff and Petitioner in the courts below; Respondent in the current petition.
2. City of Oceanside: Defendant and Respondent in the court below; Petitioner in the current petition.
3. John Mamaux: Defendant and Respondent in the courts below; Petitioner in the current petition.

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PETITION FOR WRIT OF CERTIORARI

City of Oceanside and John Mamaux, the petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment of the California Court of Appeal, Fourth Appellate District, Division One, entered in the above-entitled case on December 17, 1996.

OPINIONS BELOW

The opinion of the Court of Appeal, whose judgment is herein sought to be reviewed is an unpublished decision identified as Case Number D 021944, and is reprinted in the separate appendix to this Petition, at pages 2a-11a. The decision reversed and remanded the trial court's written Statement of Decision of August 3, 1994, which is reprinted in the separate appendix to this petition at pages 13a-19a. A timely Petition for Rehearing was denied by

the Court of Appeal on January 15, 1997; and is reprinted in the separate appendix at page 12a. A Petition for Review of Decision was filed with the Supreme Court of California on January 24, 1997, and was denied on March 12, 1997 and is reprinted in the separate appendix at page 1a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeal, Fourth Appellate District was entered on December 17, 1996. The Court of Appeal denied a timely petition for rehearing on January 15, 1997. On March 12, 1997, the Supreme Court of California denied a petition for hearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involved the First Amendment to the Constitution of the United States, which provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievance."

This case also involves the application of the First Amendment through the Fourteenth Amendment, Section 1, which provides as follows:

> "All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

This is a First Amendment civil rights case brought by respondent William Shafer pursuant to 42 U.S.C. § 1983. The lawsuit was filed against Mr. Shafer's former employer, petitioners City of Oceanside ("City") and John Mamaux when he was not rehired by the City after voluntarily resigning from his employment position.

Respondent William Shafer filed a Complaint alleging civil rights violations under 42 U.S.C. § 1983 against the City and its former City Manager, John Mamaux on September 21, 1992, based upon the following facts.

On or about June 4, 1991, while respondent was a permanent, full-time Firefighter/Paramedic with the City of Oceanside, his request for leave of absence from his position (based on his desire to operate his own painting business and related matters) was denied. On June 30, 1991, respondent voluntarily resigned from his employment with the City of Oceanside for "another job—career move". Respondent understood that he would be eligible for "consideration for reinstatement" for up to two years under certain provisions of the City Personnel Rules and Regulations. Respondent subsequently requested reinstatement for employment and on January 29, 1992, petitioner City of Oceanside notified respondent that his name had been certified to the Oceanside Fire Department for "possible" reinstatement of employment as a Firefighter/Paramedic. However, respondent was considered an original job applicant under the City rules and was not hired back with the City in 1992.

Respondent alleged that he was denied employment in retaliation for writing a letter to the editor of the Blade Citizen newspaper on or about December 1990, while respondent was employed as a Firefighter. At that time respondent suffered no adverse employment action or formal discipline. This letter was, in respondent's opinion, critical of the City's management of the Firefighter/

Parademic program; and based on that, respondent alleged he was denied First Amendment civil rights when he was not hired back by the City.

After a *successful demurrer*, respondent filed an Amended Complaint which survived a second demurrer in 1992.

The Amended Complaint alleged two "counts" of civil rights violations. The first count alleged that respondent had a vested property right in reinstatement, i.e., re-employment with the City premised upon a de facto policy of rehiring firefighters who resigned in good standing and sought timely rehire. The second count alleged First Amendment infringement of free speech rights.

Respondent maintained that the sole reason he was not hired back by the City in 1992, was because of the newspaper article he wrote in 1990 that disagreed with the operation of the Fire Department. The Amended Complaint further stated a cause of action against petitioner John Mamaux for conspiracy to violate respondent's civil rights, in violation of 42 U.S.C. § 1985, and a cause of action for intentional infliction of emotional distress.

Petitioners later filed Motions for Summary Judgment directed at respondent's lack of guaranteed or property right to employment and the lack of legal authority supporting a cause of action against an employer for refusing to hire a job applicant allegedly because of something the applicant may have said. The Court, however, denied the motions and the matter proceeded to trial.

THE RULINGS BELOW

The trial in this matter commenced on January 18, 1994. The California Superior Court determined, after reviewing briefs and arguments, that the question of the existence of a property right in reemployment could not be assumed, but was a question of law to be determined by the Court. The trial Court therefore bifurcated the

trial and discharged the jury pending the determination of whether respondent had any property or fundamental right to rehire. The trial Court determined that the evidence at trial overwhelmingly supported the petitioners and that all respondent had was a unilateral or mistaken belief that he could resign from the City and then later reclaim a job back. At a hearing on March 4, 1994, the Court held that respondent had not sustained the burden of establishing a vested property right. In addition, the trial Court determined that respondent could not state a claim for violation of free speech rights in that he was in the same position as any new job applicant seeking hire, who could be permissibly denied employment for any number of discretionary reasons. Finally, the trial Court held that the cause of action against petitioner John Mamaux for intentional infliction of emotional distress was interrelated to the civil rights violation and therefore had to be dismissed along with the other causes of action. The trial court issued its formal Written Statement of Decision on August 3, 1994. Appendix at pages 13a-19a.

Respondent filed a Notice of Appeal to the Court of Appeal on September 2, 1994. Respondent did not appeal the Court's ruling on the due process claim. Respondent likewise did not appeal the Court's decision regarding the lack of property right to employment. Respondent appealed the Court's ruling on the free speech claim and the conspiracy and intentional infliction of emotional distress claims.

The Court of Appeal reversed the trial court on the free speech and intentional allocation of emotional distress causes of action. The Court held that despite the lack of appellant's right to a job with the City, he had a right as a matter of federal law to go to trial to determine whether the newspaper article he wrote played a factor in violation of his rights to free speech in the City's decision not to hire him. (Citing *Mount Healthy City Bd. of Ed. v. Doyle,* 429 U.S. 274 (1977).) The Court stated that the issue

to be decided was whether the respondent's free speech in writing a newspaper article served to deny him a government benefit of having an opportunity to obtain a job with the City. Appendix at pages 2a-11a. Petitioners sought discretionary review in the Supreme Court of California. The Court denied review on March 12, 1996. Appendix at page 1a.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO CLARIFY ISSUES RELATED TO FREE SPEECH AND GOVERNMENT EMPLOYMENT

The lower court concluded that the respondent may state a claim as a job applicant for employment for denial of his First Amendment rights. However, the court enunciated a strained interpretation of this Court's First Amendment rulings on point.

The respondent in this case voluntarily resigned from the City to pursue other employment. He subsequently had a change of heart and decided to seek hire with the City again. Therefore, the respondent stood in the same position as an original job applicant for purposes of this matter and appeal.

While conceding that the respondent had no property right to reemployment or reinstatement, the lower court analyzed his claim akin to a termination of employment or employment discharge case.

With this as a backdrop, the Court of Appeal analyzed this case affording the respondent a heightened right to a government job, which was arguably denied when the City decided not to hire him. The Court ruled that the respondent should be allowed to prove the denial of a government employment due to his free speech claims. (Citing *Rutan v. Republican Party*, 497 U.S. 62 (1990).)

The Court of Appeal has opened the floodgate of litigation against the City and governmental entities. Under

the Court's First Amendment analysis, any applicant for a governmental job may now claim that she/he was denied employment because she/he prior to employment, criticized the governmental entity or its operations, in an interview, resume, writing, etc. If not hired, the applicant could then pursue a civil rights claim for a First Amendment deprivation. Such a scenario could lead to countless meritless lawsuits against the City and other governmental entities.

In reaching its decision, the Court relied upon several cases enunciated by this Court and other federal courts. The Court cited *Perry v. Sindermann,* 408 U.S. 593 (1972), where this Court afforded a civil rights action to a teacher whose contract was not renewed, allegedly because of his free speech exercise. In deciding that such an action could be brought, the Court ruled that the respondent's lack of a contractual or tenure "right" to reemployment was immaterial to his free speech claim.

Similarly, the Court cited *Hyland v. Wonder,* 972 F.2d 1129 (9th Cir. 1992), where the Court of Appeal ruled that a government volunteer could not be denied the right to volunteer because of critical comments. Neither of the above cases addressed a situation involving *applicants* for employment or positions. In both situations, the affected individuals held positions which were subsequently denied them, or taken from them due to their free speech. Such a scenario presents a different analysis form this case involving a job applicant.

In *Board of County Commissioners v. Umbehr,* —— U.S. ——, 116 S.Ct. 2361, (1996), this Court extended First Amendment protection to those who independently contract with municipalities, ruling that termination of contracts for free speech exercises violates the First Amendment. However, in discussing its ruling, this Court stated that its holding only pertained to situations where a "pre-existing commercial" relationships already exist. (*Id.* at 116 S.Ct. 2352.) In this sense, *Umbehr* is con-

sistent with *Perry v. Sindermann* holding that non-renewal or termination of a *pre-existing relationship* for free speech reasons violates the First Amendment. In fact, this Court refused to discuss the situation as in the instant case where such a pre-existing relationship does not exist. (*Board of County Commissioners v. Umbehr, supra,* at U.S. ——, 116 S.Ct. 2342, 2352.)

This case presents the opportunity for this Court to clarify and apply the decision in *Umbehr* to job applicants for government employment. Absent such guidance, employers will be left to speculate as to how to handle job applicants who may have expressed critical speech prior to the hiring process.

II. CERTIORARI SHOULD BE GRANTED TO DEFINE A STANDARD UNDER WHICH MUNICIPALITIES CAN EXERCISE HIRING DISCRETION TO EVALUATE JOB APPLICANTS

The factual record below is clear that the respondent, as a former City employee, had no rights to job reinstatement *per se*. As such, the trial Court ruled that the respondent was an original job applicant for purposes of this action. The trial Court's ruling in this regard was not appealed.

The Court of Appeal incorrectly decided important, broad based free speech issues as to federal rights and a municipality's abilities to evaluate original job applicants in the context of hiring decisions. Moreover, the Court failed to define any standard by which the City or any governmental entity may validly weigh job applicants and what they say about the job, etc. when making employment decisions. Under the Court's analysis, any job applicant's critical speech would trigger a First Amendment civil rights lawsuit if the applicant was not hired by the governmental employer.

The Court failed to define what type of specific comment is valid and when a municipality may rely on the

comment in making an employment decision. In this regard, comments in a job interview, on a resume, application, as well as in a newspaper qualify as potential civil rights violations where applicants claim, without more, reliance on the comments as reasons for job rejections.

Furthermore, the job applicant alone has power to define what constitutes "critical" expression in these actions. In essence, the applicant has more rights than an employee and may define his or her speech as being critical of the employer as the applicant sees fit, for purposes of these "new civil rights" actions.

This result offers the City no guidance in exercising valid hiring discretion or evaluating, for example, a job applicant's attitudes or abilities to work within a particular job structure. The City is now in no position to determine whether a person's comments or response make that person a fitting job candidate or not. Similarly, the City has no clear way to evaluate a person's positive or negative attitudes about a potential job without being subject to a civil rights lawsuit and possible liability for First Amendment infringement.

These are all questions that are left unanswered by the Court's decision and *Board of County Commissioners v. Umbehr, supra,* at —— U.S. ——, 116 S.Ct. 2342, make this case proper for Certiorari.

CONCLUSION

WHEREFORE, petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Mar. 12, 1997]

Fourth Appellate District, Division One, No. D021944
S058726

IN THE SUPREME COURT OF CALIFORNIA

WILLIAM L. SHAFER,
Appellant

v.

CITY OF OCEANSIDE *et al.*,
Respondents

Respondents' petition for review DENIED.

GEORGE
Chief Justice

APPENDIX B

[Filed Dec. 17, 1996]

COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

D021944
(Super. Ct. No. N57302)

WILLIAM L. SHAFER,
Plaintiff and Appellant,

v.

CITY OF OCEANSIDE *et al.*,
Defendants and Respondents.

APPEAL from a judgment of the Supreme Court of San Diego County, Herbert B. Hoffman, Judge. Reversed.

William L. Shafer appeals an adverse judgment of the superior court after trial of his civil rights action against defendants the City of Oceanside (City) and John Mamaux, its former city manager. (42 U.S.C. § 1983 (section 1983).) Shafer does not challenge the trial court's finding that he did not have a constitutionally protected property interest in obtaining reemployment by rehire or reinstatement from an eligibility list after he resigned from City employment as a firefighter/paramedic. However, he contends the trial court erroneously granted a judgment on the pleadings, on its own motion, to the effect that Shafer could not pursue a claim for damages for violation of civil rights for the City's failure to rehire or reinstate him as alleged retaliation against him for an

earlier exercise of his protected free speech rights. (U.S. Const., 1st Amend.) Shafer also contends that related causes of action against Mamaux, conspiracy and intentional infliction of emotional distress, remain viable even absent such a protected property interest.

We disagree with the trial court's conclusion that Shafer's damages claim for free speech violations is inextricably linked with his employment status as a former employee who had no current property right in reemployment. Rather, existing authority requires us to view his claim of deprivation of a governmental benefit or privilege, due to his exercise of free speech rights, separately from his employment status for purposes of analyzing this First Amendment claim and the related causes of action. (*Rutan* v. *Republican Party of Illinois* (1990) 497 U.S. 62; *Perry* v. *Sindermann* (1972) 408 U.S. 593.) We therefore reverse the judgment.

I

Standard of Review

The legal issue presented is the relationship between Shafer's unsuccessful claim to a property right of employment and his claim of unlawful retaliation for exercise of his right of free speech, the main subject of this appeal. Because this is an appeal of a judgment on the pleadings on that theory, "[t]he task of this court is to determine whether the complaint states a cause of action. All facts alleged in the complaint are deemed admitted, and we give the complaint a reasonable interpretation by reading it as a whole and all of its parts in their context. [Citations.] We are not concerned with a plaintiff's possible inability to prove the claims made in the complaint, the allegations of which are accepted as true and liberally construed with a view toward attaining substantial justice. [Citations.]" (*Lance Camper Manufacturing Corp.* v. *Republic Indemnity Co.* (1996) 44 Cal.App.4th 194, 199.) Moreover, on appeal, " 'we are not bound by the determination of

the trial court, but are required to render our independent judgment on whether a cause of action has been stated.' [Citation.]" (Ibid.)

II

Background

The parties agree that the facts in this matter are important mainly as a backdrop to the legal issues presented. Using this approach, we briefly summarize the facts as alleged in the first amended complaint, adding to some extent various factual details as laid out in pretrial summary judgment proceedings. While Shafer was employed as a City firefighter, he wrote an article for a local newspaper criticizing the City administration's budget cuts and proposed changes in the firefighting/paramedic delivery system. This article was originally anonymous, but was later correctly attributed to Shafer. He was informally reprimanded about writing the article but received no discipline and was later promoted after the article episode.

In May 1991, Shafer resigned his employment to take care of personal problems and to start his own business. He alleges he did this in light of a de facto City policy of rehiring all firefighters who resigned in good standing and sought rehire within two years of their resignation.

In January 1992, Shafer applied to the City for reinstatement and was placed on the eligibility list. However, when he admitted to Mamaux, upon being questioned, that he had written the article in question, he was told he would not be reinstated and he would never work for the City again. The City hired other firefighters off the eligibility list while Shafer was eligible, including persons with lesser qualifications than his. Most or all other firefighters who had recently sought reinstatement were rehired. Shafer was not rehired.

Shafer brought this action for damages for civil rights violations against the City and Mamaux on the two theories described, loss of a protected property right in

employment and infringement of free speech rights. Mamaux was additionally charged as a defendant with conspiracy to violate civil rights and with intentional infliction of emotional distress. Various pretrial motions were brought, including summary judgment motions by the City and Mamaux, which were denied.

The matter went to jury trial, but the trial court discharged the jury after determining that preliminary legal issues remained to be addressed. The trial court then took evidence and briefing on the property right to employment issue, and determined it adversely to Shafer. The court then ruled that Shafer could not proceed on his free speech claim in the absence of a protected property right to public employment, explaining in its statement of decision: "Plaintiff has failed to cite any case or authority that stands for the proposition that a cause of action lies for failure to hire a new job applicant because of a previously exercised constitutional right, such as freedom of speech. Plaintiff was not dismissed from employment for writing his article. He voluntarily resigned and was subsequently not rehired as a new job applicant." The trial court thus concluded that Shafer's case did not constitute a discharge or dismissal from employment because of a First Amendment exercise.

Further, the court found that the claims against Mamaux were so closely related to the other claims that they must fall also. Judgment was entered nunc pro tunc and Shafer appeals.

III

Shafer's Status Regarding Reinstatement

The City and Mamaux argue, and the trial court found, that Shafer's beliefs that he would certainly be reinstated on application after his resignation were only a unilateral understanding, and no mutually explicit understanding among the City or its employees existed with regard to a right to automatic reinstatement. The trial court thus

viewed Shafer as a mere applicant for employment, with no right to reinstatement. Such an applicant, it concluded, had no basis for a civil rights action based on the theory of retaliation for free speech exercise.

To analyze the trial court's conclusions, we first evaluate the nature of the deprivation of rights claimed here: Shafer is alleging his request for reinstatement, i.e., the government benefit of opportunity for employment, was not processed fairly because he was being penalized for speaking out on an issue of public concern pursuant to his First Amendment rights. He claims that his exercise of free speech played too large a part in the City's denial to him of a governmental benefit. The issue we must address is whether such an applicant for employment has a cognizable claim under title 42 of the United States Code, section 1983.[1]

IV

Free Speech Claimants under Section 1983

In *Perry* v. *Sindermann, supra,* 408 U.S. 593, 597, the Supreme Court dealt with the question of whether a teacher whose one-year contract was not renewed, allegedly because of his exercise of free speech rights, could bring a claim that the nonrenewal of his contract violated the First and Fourteenth Amendments even though he lacked a contractual or tenure right to reemployment. The Supreme Court held that such a claim was cognizable, for these reasons:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the

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[1] Shafer has alleged his civil rights claim against both the City and Mamaux, its former city manager. In discussing that cause of action, we refer to these defendants collectively as the City. The other two causes of action alleged against Mamaux as an individual will, as the trial court found, stand or fall with the civil rights claims. As we will explain, they remain valid at this pleadings stage of the proceedings.

government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' [Citation.] Such interference with constitutional rights is impermissible.

". . . .

"Thus, the respondent's lack of a contractual or tenure 'right' to re-employment for the 1969-1970 academic year is immaterial to his free speech claim." (Ibid.)

In *Rutan* v. *Republican Party of Illinois, supra*, 497 U.S. 62, 76-79, the majority opinion relied on this passage from *Perry* v. *Sindermann, supra*, 408 U.S. at page 597 to hold that a plaintiff, Moore, who claimed he had been repeatedly denied state employment because he did not have the support of Republican Party officials, could assert a claim that his First Amendment rights had been violated, even though he had no claim of right to employment in the first place. (*Rutan, supra*, 497 U.S. at p. 77 fn. 9.) Although *Rutan* arose in the context of political patronage hiring and personnel practices, its statements on First Amendment rights extend to this context as well: "Patronage hiring places burdens on free speech and association similar to those imposed by the patronage practices discussed above." (Id. at p. 77.)[2] We are presented

[2] In its ruling, the trial court relied on *Messer v. Curci* (6th Cir. 1989) 881 F.2d 219 for the proposition that a mere applicant for employment may not state a section 1983 claim based on free speech violations by alleging that preference was given to other appli-

with a more traditional free speech exercise, and may thus apply the analysis of *Rutan* in this context. There, the court concluded,

> "It is unnecessary here to consider whether not being hired is less burdensome than being discharged, because the government is not pressed to do *either* on the basis of political affiliation. The question in the patronage context is not which penalty is more acute but whether the government, without sufficient justification, is pressuring employees to discontinue the free exercise of their First Amendment rights. [¶] If Moore's employment application was set aside because he chose not to support the Republican Party, as he asserts, then Moore's First Amendment rights have been violated. Therefore, we find that Moore's complaint was improperly dismissed." (*Id.* at p. 79.)

Another case holding that a First Amendment civil rights claim may be asserted by a plaintiff having no property interest in a particular employment position is *Hyland* v. *Wonder* (9th Cir. 1992) 972 F.2d 1129. Plaintiff Hyland worked for some time as a volunteer for the San Francisco Juvenile Probation Department. He prepared a memorandum to the judges supervising the San Francisco Juvenile Hall, detailing numerous problems he saw at the Hall and the perceived failings of its director. His volunteer status and privileges were terminated after his supervisor learned of the memorandum's existence. Hyland sued various public officials, alleging that his termination constituted impermissible retaliation for pro-

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cants because of their political activities. That decision was vacated by the Supreme Court after *Rutan* and the matter was remanded to the Court of Appeals, which reversed the district court's judgment dismissing the complaint and remanded for further proceedings in light of *Rutan*. (*Messer v. Curci* (1990) 497 U.S. 1001; subsequent opn. *Messer v. Curci* (6th Cir. 1990) 908 F.2d 103.) The dicussion relied on by the trial court is thus not of assistance on this appeal.

tected speech in violation of the First and Fourteenth Amendments to the federal Constitution. His complaint was dismissed and he appealed.

In discussing Hyland's status as either a public employee or a volunteer, the Court of Appeals ruled that that issue was not determinative of his entitlement to First Amendment protection. Rather, the Court of Appeals discerned "broader constitutional principles animating the Supreme Court's decisions on public employee speech. [¶] The right of public employees to speak on matters of public concern, acknowledged in cases like *Connick* v. *Myers* [(1983) 461 U.S. 138] is an outgrowth of the constitutional tenet that public officials may not deny or deprive a person of a governmental benefit or privilege on a basis that infringes her or his freedom of speech. (*Perry* v. *Sindermann*, 408 U.S. 593, 597.)" (*Hyland* v. *Wonder*, *supra*, 972 F2d at p. 1134.)

Regarding the plaintiff's status, the Court of Appeals concluded that "the relevant question, for purposes of Hyland's First Amendment claim, is not whether Hyland was a public employee, but rather whether the opportunity to serve as a volunteer constitutes the type of governmental benefit or privilege the deprivation of which can trigger First Amendment scrutiny. We hold that it does." (*Hyland* v. *Wonder*, *supra*, 972 F.2d at p. 1135.) The court continued:

> "In sum, whether Hyland is labelled a public employee or a volunteer is not determinative of whether Hyland stated a claim of First Amendment infringement. Nor is the at-will nature of his position dispositive. The critical question is simply whether Hyland has alleged the loss of a valuable governmental benefit or privilege in retaliation for his speech. We conclude that the loss of a high-level volunteer position, such as that held by Hyland in the [Juvenile Probation Department], constitutes a

deprivation of a valuable governmental benefit or privilege." (*Id.* at p. 1136.) [8]

From this authority we conclude that Shafer, as an applicant for reinstatement to his former position, may state a claim for denial of his First Amendment rights as alleged. Shafer must be allowed to attempt to make a factual showing that the City and Mamaux, its official, made a decision not to rehire him in order to punish or penalize him for the exercise of his First Amendment rights. The "critical question" is whether he has alleged the loss of a valuable government benefit or privilege as retaliation for his speech. (*Hyland* v. *Wonder, supra*, 972 F.2d at p. 1136.) The trial court accordingly erred in granting judgment on the pleadings, in light of the broad constitutional principles outlined above which are to be applied toward reaching the goal of protecting speech on matters of public concern in the public employment arena.

V

Role of Free Speech in Denial of Benefit

For the guidance of the trial court, we outline the issues to be dealt with on remand after resolution of this pleadings question. As in *Perry, supra*, 408 U.S. at page 598, this case was terminated before the necessary factual inquiries took place:

"In this case, of course, the [plaintiff] has yet to show that the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech. The District Court foreclosed any opportunity to make this showing when it granted summary judgment. Hence, we cannot now hold that the [public entity's] action was invalid."

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[8] See also *Janusaitis* v. *Middlebury Volunteer Fire. Etc.* (2d Cir. 1979) 607 F.2d 17, where the court held that the dismissal of a volunteer firefighter for complaining about low morale and inadequate training and discipline could violate the First Amendment. (*Id.* at p. 25.)

In general, the courts are solicitous of a public employer's right to make good faith discretionary hiring decisions. In that regard, the authority of *Mt. Healthy City Bd. of Ed.* v. *Doyle* (1977) 429 U.S. 274 provides guidance. There, the court discussed the causation inquiry that is necessary when an employee is not hired or rehired, in order to distinguish between results caused by constitutional violations or other factors. The court stated:

> "Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." (*Id.* at p. 287, fn. omitted.)

No such factual inquiry has yet been conducted here and we therefore remand for appropriate further proceedings.

DISPOSITION

The judgment is reversed and the matter is remanded for further proceedings in accordance with the views expressed in this opinion. Costs to appellant.

/s/ Huffman
HUFFMAN, J.

WE CONCUR:

/s/ Kremer
KREMER, P.J.

/s/ Haller
HALLER, J.

APPENDIX C

[Filed Jan. 15, 1997]

COURT OF APPEAL
FOURTH APPELLANT DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

D021944

(Super. Ct. No. N57302)

WILLIAM L. SHAFER,
Plaintiff and Appellant,

v.

CITY OF OCEANSIDE *et al.*,
Defendants and Respondents.

THE COURT:

The petition for rehearing is denied.

/s/ Kremer
KREMER, P.J.

APPENDIX D

[Filed Aug. 3, 1994]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

Case No. N 57302

WILLIAM L. SHAFER,
Plaintiff,

vs.

CITY OF OCEANSIDE, JOHN MAMAUX and DOES 1 through 20, inclusive,
Defendants.

STATEMENT OF DECISION

On January 18, 1994, this matter came before the Court as a First Amendment Civil Rights action under 42 U.S.C. § 1983. Plaintiff William Shafer (hereafter "Plaintiff") is a former firefighter with the City of Oceanside who resigned and unsuccessfully sought reinstatement or rehire with the Fire Department. Plaintiff's complaint against Defendant City of Oceanside and former City Manager John Mamaux alleged violations of his freedom of speech, conspiracy to violate his civil rights and intentional infliction of emotional distress (against Defendant Mamaux). Plaintiff has alleged in his First Amended Complaint that he was not rehired by the Fire Department at the direction of Defendant John Mamaux because of a newspaper article that he wrote critical of a planned reorganization of the Fire Department orchestrated by the City Council. He further alleged the City had a policy of reinstating firefighters who resigned in good standing, thereby creating a defacto property right in reinstatement

and alleging thereon that he was entitled to due process protections in his request for reinstatement.

On January 18, 1994, the Court ruled that it would first make a determination as to whether Plaintiff possessed a property interest in reemployment with the City of Oceanside thereby creating a nexus between Plaintiff's free speech exercise and the denial of reemployment. The Court demed this to be a question of law to be decided at the preliminary stage of these proceedings. The Court therefore bifurcated the trial to determine whether Plaintiff had a property right to reemployment with the City of Oceanside.

The Plaintiff testified that he resigned from the Fire Department perhaps intending to return if a private painting busines did not thrive. He believed that if he resigned in good standing and there was a departmental vacancy, he would be automatically or routinely rehired if he applied for reinstatement within two (2) years from his resignation date. Plaintiff candidly admitted that no one guaranteed his rehire by the City. He allegedly based his belief upon the rehiring of approximately four (4) former firefighters over a period of several years. He testified that he had spoken to Eric Osterberg (a rehired firefighter) and Captain Hugh Fleming about reinstatement prior to resigning.

Plaintiff admitted that not one person within the City ever guaranteed him or promised him that he would ever be rehired. Furthermore, he never produced any rule, writing, independent witnesses or firefighters that corroborated his testimony or beliefs that automatic rehire with the Fire Department was a right of former employees. It was clear from the testimony presented that Plaintiff had only a unilateral belief or expectancy of automatic rehire with the Fire Department.

The defense produced several witnesses that rebutted Plaintiff's unilateral belief relative to the City's reinstate-

ment practices. Mary Kaerth, former City Personal Director and Dwight Hill, current Personnel Manager, both testified as to the City's rules on reinstatement. Both testified that the City reinstatement policy vests absolute discretion in the City Fire Chief in making decisions as to the rehiring of former employees/firefighters. Both stated that reinstatement was not a right and that there was no practice or custom such that former employees would be automatically or routinely rehired. In fact, Dwight Hill testified that at least 20-25 former City workers were not rehired in the past five years. He further testified that the City rules do not even require that those firefighters on the reinstatement eligibility list be interviewed by the City's Fire Chief. In this case, the testimony revealed that the Plaintiff was actually interviewed by Fire Chief Dale Geldert.

James Rankin, former Fire Chief testified that he explained this reinstatement process to the plaintiff prior to his resignation. He further discussed with Plaintiff that rehire was only granted upon recommendation from supervisors and staff, personnel file review and analysis as to the needs of the department. Dale Geldert, the current Fire Chief, testified that he used a similar process when considering rehiring firefighters, and that he considered Plaintiff for each opening in the department from early 1992 until Plaintiff's eligibility ended.

Jack Francis of the Fire Department likewise testified as to the highly discretionary nature of considering/rehiring reinstatement applicants. He stated that there is no departmental practice or policy of automatically rehiring former firefighters.

Hugh Fleming corroborated Jack Francis' testimony in stating that there was/is no guarantee of rehire with the department. This was especially true around 1991, with the budget problems and downsizing of the Fire Department in progress. He stated that rehire was discretionary with the department, and that he urged Plaintiff not to

resign given the uncertain future of the Fire Department and the administrative discretion that goes into decisions to rehire former firefighters. Despite his urgings Plaintiff resigned anyway.

At the close of the evidence, the Court invited briefing on the issues raised at this preliminary trial and, in addition, identified further issues of concern with respect to Plaintiff's ability to state a claim for violation of free speech rights. Plaintiff contended that, irrespective of the outcome of this first phase of trial, he should be allowed to proceed with his claim of violation of free speech rights.

The Court asked that the parties analyze three issues in supplemental trial briefs:

1. Did Plaintiff have a "property right" in reemployment as a matter of law?

2. Assuming Plaintiff had a property right, was there are denial of due process warranting damages as a result?

3. Assuming Plaintiff has no property right in reemployment, may his First Amendment civil rights cause of action remain and proceed to trial?

After reading and considering the briefs submitted by all parties, the Court determines that the testimony overwhelmingly demonstrates that there was no property right with respect to Plaintiff's reemployment by the City of Oceanside as a matter of law.

The Plaintiff indicated that no one within the City had ever guaranteed him that he would ever be rehired. Plaintiff also admitted that he was warned about resigning and that he received a letter directing his attention to the rule that related to reinstatement, which basically only allows an employee to be placed on an eligibility list within two years without having to go through the necessity of an application or a test.

The Court further determines that Plaintiff's allegations that he had a defacto property right to rehire were based upon his own unilateral understanding. There is no evidence that there was a mutually explicit understanding among the City or its employees respecting a right to automatic reinstatement. The evidence by more than a preponderance establishes this fact.

Plaintiff has failed to meet the criteria of *Perry v. Sinderman*, (1972) 408 U.S. 593, 610, 33 L.Ed.2d 570 respecting the existence of a property right to reemployment. To the contrary, the Defendants have overwhelmingly proven that the beliefs of Mr. Shafer relative to resignation and reinstatement were unilateral and of his own accord.

Given the Court's finding that Plaintiff had no property right to reemployment, the second issue in this analysis regarding due process is resolved as being moot and need not be further addressed.

As to the third issue briefed, the Court has determined that this must be treated as a motion for judgment on the pleadings as no evidence was received ont his point. The Court acknowledges that some of the evidence received addressed this issue, but was not received for that purpose. The Court acknowledges further that, should this action have been tried with respect to the issue of a free speech deprivation, Plaintiff, had intended on presenting additional evidence. Because of the manner in which this motion is being treated, the Court must view the facts in the light most favorable to the Plaintiff and therefore presumes that, if this matter were to proceed to trial, Plaintiff could establish that he was denied re-employment as a result of an otherwise protected exercise of his right to free speech. The Court does not rule that these facts are established by the evidence, only that they are presumed for purposes of this ruling.

The Court finds that, as a matter of law, Plaintiff cannot state a claim for violation of his rights of free speech.

Plaintiff contends that the case of *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) forms the basis for his claim. This Court distinguishes the instant case from *Mt. Healthy* and all other cases relied upon by Plaintiff. The Court finds that this case is more closely analogous to *Messer v. Curci*, 881 F. 2d 219 (6th Cir. 1989), insofar as Plaintiff is viewed as a mere applicant for employment, with no right to reinstatement. The Court views the cases relied upon by Plaintiff as analogous to termination cases, irrespective of language contained therein that the free speech claims are not dependent on the existence of a property right. The Court notes that Plaintiff has failed to cite any case or authority that stands for the proposition that a cause of action lies for failure to hire a new job applicant because of a previously exercised constitutional right, such as freedom of speech. Plaintiff was not dismissed from employment for writing his article. He voluntarily resigned and was subsequently not rehired as a new job applicant.

The Court has not found any authority or holding that it violates the Federal Constitution when a person is not hired based upon something that the person previously stated in an exercise of free speech.

The Court has reviewed the cases submitted by all parties including *Board of Regents of State of California v. Roth* (1972) 408 U.S. 564, 33 L.Ed.2d 548 and *Perry v. Sinderman* (1972) 408 U.S. 593, 610, 33 L.Ed.2d 570 in analyzing this issue. The Court finds that Plaintiff's case does not constitute a discharge or dismissal from employment because of a First Amendment exercise.

As in the case of *Messer v. Curci* (6th Cir. 1989) 881 F.2d 219, 221, the Plaintiff in the instant matter was a job applicant seeking rehire. Plaintiff had been separated from the City of Oceanside for at least six months before he sought reinstatement. He was therefore a new job applicant seeking hire in the Fire Department.

Based on the foregoing, judgment is entered in favor of Defendant in his matter as to all civil rights related causes of action. Plaintiff has also alleged an additional cause of action against Defendant Mamaux for intentional infliction of emotional distress. This Court finds that the intentional infliction of emotional distress claim is entirely contingent upon the existence of a constitutional right, allegedly violated by Defendant Mamaux. Since this claim is dependent on the dismissed claims, it must be dismissed as well. It is directed that judgment be entered on this cause of action in favor of Defendant Mamaux.

IT IS SO ORDERED.

Date: Aug. 3, 1994

/s/ Herbert B. Hoffman
HERBERT B. HOFFMAN
Judge of the Superior Court